No. 09-1214

IN THE

Supreme Court of the United States

BABAJIDE SOBITAN,

Petitioner,

v.

LORI GLUD, JOHN PODLISKA, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

This petition presents for review an important question of federal law that has not been, but should be, resolved by this Court: whether the exception to the federal officer immunity conferred by the Westfall Act, 28 U.S.C. §2679, for claims alleging a violation of a "statute of the United States" applies to claims alleging a violation of a ratified treaty like Article 36 of the Vienna Convention. As demonstrated below and in the Petition, both the ordinary and natural meaning of "statute," and the history and purpose of the Westfall Act demonstrate that the Westfall Act should not be construed to immunize federal officers from claims alleging violations of treaties.

I. This Court has not yet resolved the important question whether the exception in 28 U.S.C. §2679(b)(2)(B) that applies to claims alleging violations of "statute[s] of the United States" applies to claims alleging violations of treaties adopted and ratified by the Senate and the President.

Respondents devote most of their brief to arguing that the ordinary and natural meaning of "statute" is limited to bills passed by Congress and signed by the President. (Op. Br. 6-10.) What Respondents do not and cannot contend, however, is that this Court has held that the ordinary and natural meaning of "statute" is so limited. To the contrary, the Court's decisions show that Congress has used "statute"

more broadly, in a way that would encompass ratified treaties of the United States.

As explained in the Petition, the Court previously observed, in *Stevens v. Griffith*, 111 U.S. 48 (1884) and *American Federation of Labor v. Watson*, 327 U.S. 582 (1946), that Congress used "statute" to refer to *all* enactments to which a state gives the force of law, not only bills passed by a legislature and signed by the chief executive. In *Stevens*, the Court noted that "[a]ny enactment, to which a state gives the force of law, whether it has gone through the usual stages of legislative proceedings or been adopted in other marks of expressing the will of the state, is a statute of the state within the meaning of the acts of Congress touching our appellate jurisdiction." 111 U.S. at 50. Likewise, in *Watson*, the Court stated that the "statute" law of a nation consists of "all enactments, however adopted, to which a state gives the force of law." 327 U.S. at 592.

Respondents attempt to distinguish *Stevens* and *Watson* on the ground that they involved state "statutes" rather than federal "statutes," (*see* Op. Br. 8-9), but that is a distinction without a difference. *Stevens* and *Watson* make clear that there is an ordinary and natural meaning of "statute" that has been employed by Congress to refer to more than just bills enacted by a legislature and signed by the chief executive, which would encompass treaties.

Respondents also rely upon *United States v. Vuitch*, 402 U.S. 62, 64 (1971). (Op. Br. 7.) In

Vuitch, the Court considered whether an act of Congress that applied only in the District of Columbia was a "statute" for purposes of the jurisdiction provisions of the Criminal Appeals Act. 402 U.S. at 64. The Court observed that the law was a statute "in the sense that it was duly enacted into law by both Houses of Congress and was signed by the President." *Id* at 64-65. The Court did *not* state that this was an exclusive definition of "statute." *Id*.

These cases underscore why review is warranted here: although the Court previously has noted that Congress has used the term "statute" to include more than just bills passed by a legislature and signed by a chief executive, the Court has not yet resolved whether the phrase "statute of the United States" in the Westfall Act refers to ratified treaties like Article 36 of the Vienna Convention, in addition to bills passed by Congress and signed by the President. This is an important issue for the Court to resolve because it determines whether federal officers will be immune from claims alleging violations of treaties.

II. Contrary to what Respondents argue, construing 28 U.S.C. §2679(b)(2)(B) to exempt claims alleging violations of ratified treaties from the Westfall Act's immunity provisions would not make the exemption for constitutional claims in 28 U.S.C. §2679(b)(2)(A) "superfluous."

Respondents also argue that interpreting the phrase "statute of the United States" in 28 U.S.C. §2679(b)(2)(B) to include treaties would render the exemption in 28 U.S.C. §2679(b)(2)(A) that applies to claims alleging violations of the Constitution "superfluous," because, Respondents assert, the Constitution also would be a "statute of the United States," and therefore there would be no need for 28 U.S.C. §2679(b)(2)(A). (Opp. Br. 9-10.) Respondents are incorrect.

As Mr. Sobitan demonstrated (Pet. 12), the exemption to the Westfall Act specifically addressing constitutional claims is not superfluous because, as the structure of the Westfall Act recognizes, whether a plaintiff can assert a claim for violation of the Constitution involves a different analysis than whether a plaintiff can assert a claim for violation of a statute. The former depends upon whether a *Bivens* claim is available. *See United States v. Smith*, 499 U.S. 160, 166-67 (1991). The latter turns on whether the relevant act or treaty creates a privately enforceable right and cause of action, *see Blessing v. Freestone*, 520 U.S. 329, 338-40 (1997), which is why 28 U.S.C. §2679(b)(2)(B) – but not 28

U.S.C. §2679(b)(2)(A)—includes phrase "under which such action against an individual is otherwise authorized." Thus, Respondents are wrong to contend that, if Mr. Sobitan's interpretation of "statute" is correct, Congress could have simply included the exemption set forth in 28 U.S.C. §2679(b)(2)(B), because the phrase "under which such action against an individual is otherwise authorized" has no application to a claim asserting a violation of the Constitution.[1]

III. The Westfall Act was intended to restore the *status quo ante* with respect to federal officer immunity from state law tort claims; it was not intended to immunize federal officers from suits for violations of federal law.

As Mr. Sobitan demonstrated (Pet. 13-16), the history and purpose of the Westfall Act make clear that it was not intended to immunize federal officers from liability for treaty violations, and instead was intended to "protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of

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[1] Respondents also contend that construing 28 U.S.C. §2679(b)(2)(B) to apply to claims asserting violations of treaties would create two exceptions to the Westfall Act for constitutional claims—one under 28 U.S.C. §2679(b)(2)(A) and one under 28 U.S.C. §2679(b)(2)(B). (Op. Br. 10.) Respondents' argument, however, ignores the principle that, in construing a statute, a specific provision controls over one of more general application. *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

Federal employees with an appropriate remedy against the United States." 102 Stat. 4563, 4564 (1988); *accord Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-26 (1995); H.R. Rep. No. 100-700, at 4 (1988), as reprinted in 1988 U.S.C.C.A.N. 5945, 5947.

Respondents brush aside the express purpose of the Westfall Act (Op. Br. 11 n.4), and argue that 28 U.S.C. §2679(b)(1) creates "a capacious rule of immunity" against *any* civil action that, according to Respondents, reflects the congressional intent behind the Westfall Act. (Op. Br. 10-12.) Respondents' argument, however, ignores the exceptions to federal officer immunity set forth in 28 U.S.C. §2679(b)(2), which, read together (as they must be) with 28 U.S.C. §2679(b)(1), are entirely consistent with the documented congressional intent to immunize federal employees from common law tort claims, and not to immunize federal employees from claims arising under the Constitution, acts of Congress, or ratified treaties.

CONCLUSION

For the reasons set forth above and in the Petition, this Court should grant this Petition for Writ of Certiorari.

Dated: July 21, 2010

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